

No. 14723
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ROBERT C. WIAN ENTERPRISES, INC., a Corporation,
Appellant,
vs.

L. O. PERSINGER and MERLE PERSINGER, Individually and
as Partners, Doing Business as Big Boy Manufacturing
Company,
Appellees.

APPELLANT'S REPLY BRIEF.

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ARGUMENT.

I.

In Entering the Order of Dismissal, the Court Below
Either Ignored Altogether or Resolved Summarily
and Prematurely Factual Issues That Could Prop-
erly Be Determined Only From the Evidence at a
Trial.

A. The Basis of Decision as Announced by the Trial Judge.

The defendants (the Appellees will be hereinafter re-
ferred to as "the defendants") assert at page 18 of their
brief that "The trial court did not base its judgment upon
the idea that relief can not legally be granted because
one party is in the restaurant business and the other

is in the manufacturing business.” As we read the record, that is exactly the basis upon which the Court did rest its decision. At the hearing below, we were from the outset confronted by Judge Westover with the concept that since we were in the restaurant business and the defendants were in the manufacturing business, we could not show a case for relief, as the following quotations from the transcript will show:

“The Court: So now the only issue in this case is the relation of the restaurant business to the manufacturing business, and that is all.” [Tr. Rec. p. 34.]

* * * * *

“The Court: That is right. But you have a manufacturing business here; you are not selling food.” [Tr. Rec. p. 35.]

* * * * *

“The Court: If the defendants here were attempting to establish a restaurant, I would go along with you, but they are not.” [Tr. Rec. p. 37.]

* * * * *

“The Court: I do not think the relationship is close enough. Consequently I will grant the motion to dismiss, with leave to file an amended complaint if you so desire, and if you can file an amended complaint showing that there is a closer relationship. But I do not think that you have established your right in the food industry, in the restaurant business, so that you can carry over that right into a manufacturing business.” [Tr. Rec. pp. 38-39.]

No amendment of our complaint could overcome the fact that we *are* in the restaurant business and the defendants are manufacturers. However, we believe that

this is not the true test of whether or not we are entitled to relief.

“ . . . the basic test of trade-mark infringement is whether the goods of the alleged infringer would be supposed by the kind of people who purchased them to emanate from the same source as the goods of the complainant.” (*Dwinell-Wright Co. v. National Fruit Product Co.*, 140 F. 2d 618, 622 (1st Cir. 1944).)

This same principle has been well stated by Judge Yankwich in an opinion that, on appeal, was adopted as the expression of this Court:

“Consequently, the courts, in both trademark and unfair competition cases, have held that where the dominant portion of a trademark, tradename or business has become identified in the mind of the public with the first user, he will be protected in the use of the name, even against a new-comer having the same surname.” (*Brooks Bros. v. Brooks Clothing of California*, 60 F. Supp. 442, 450 (S. D. Cal. 1945), aff'd 158 F. 2d 798 (9th Cir. 1947).)

B. The Basis of Decision as Visualized by the Defendants.

The brief of the defendants implicitly recognizes that the above quoted statements properly set forth the controlling principle, and they seek to justify the decision below by asserting that it was based “ . . . upon the fact that the two businesses and respective products were unrelated so that no confusion of source was likely. The differences in the two businesses was only one element.” (Appellee Br. p. 18.) But this is a question of fact that must be determined from the evidence at a trial, as we pointed out in our opening brief, beginning at page 12. We again invite the attention of the Court to the case of *John Walker*

& Sons v. Tampa Cigar Co., 197 F. 2d 72 (5th Cir. 1952) as a perfect example of the error that results from seeking to decide a matter of this type without a trial. The defendants say that our citing of the *Johnnie Walker* case stemmed from our misconception, because in our case “. . . the complaint shows both that the goods are not competitive and that there is no close relationship between the two businesses, and the Court may certainly conclude that there is no likelihood of confusion and dismiss the complaint.” (Appellee Br. p. 21.) But this is exactly what the judge in the *Johnnie Walker* case was reversed for doing! In sending the case back for trial, the opinion of the Court of Appeals stated:

“Certain it is this suit for trademark infringement may not be dismissed on motion where there is presented a factual issue as to whether defendant’s use of the name Johnnie Walker is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods.” (P. 74.)

In assuming that our business is so remote from that of the defendant that no confusion is likely, the defendants beg the very question that will be a principal issue of fact at the trial of this case. How can it be said, as a matter of law, that a restaurant operation featuring a “Big Boy” hamburger is fatally remote in its relationship with the outdoor barbecues and related accessories that are commonly used in the home production of the same menu item? Is it true, as the defendants contend, that as a matter of law the relationship in this case is more remote than is that of whiskey compared with cigars (*John Walker & Sons v. Tampa Cigar Co.*, 197 F. 2d 72 (5th Cir. 1952)? If the defendants are correct here, do they not have trouble with the thirteen cases cited at pages 16 and 17 of our opening brief? And what becomes of the

defendants' position when they consider *Churchill Downs Distilling Co. v. Churchill Downs*, 90 S. W. 2d 1041 (Ct. of App. Ky., 1936) (race track corporation protected against infringement by whiskey bottler); or *Duro Pump & Mfg. Co. v. California Cedar Products Co.*, 11 F. 2d 205 (App. D. C. 1926) (pneumatic pumps v. wallboard); or *Radio Corporation of America v. Rayon Corporation of America*, 139 F. 2d 833 (C. C. P. A. 1943) radios, etc. v. knitted rayon materials); or *Safeway Stores, Inc. v. Safeway Const. Co., Inc.*, 74 F. Supp. 455 (S. D. Cal. 1947) (grocery business v. building contractor)? In all of the cases mentioned or cited in this paragraph, the adjudicated right to protection was supported by a finding from the factual evidence that the relationship between the businesses or articles concerned was sufficient to warrant that result. In some of those cases, the tribunal below was reversed for having initially dismissed the complaint or for having otherwise ruled to the contrary.

See:

John Walker & Sons v. Tampa Cigar Co., 197 F. 2d 72 (5th Cir. 1952);

Churchill Downs Distilling Co. v. Churchill Downs, 90 S. W. 2d 1041 (Ct. of App. Ky. 1936);

Duro Pump & Mfg. Co. v. California Cedar Products Co., 11 F. 2d 205 (App. D. C. 1926);

Radio Corporation of America v. Rayon Corporation of America, 139 F. 2d 833 (C. C. P. A. 1943).

From all of the foregoing, it is apparent that the matter of whether or not our business is entitled to protection against infringement at the hands of the defendants, is a question of fact to be determined from the evidence.

In saying now simply that the relationship is not sufficient to warrant such protection, the defendants are only expressing their conclusion as to what the evidence in this case will show. Just as occurred in the *Johnnie Walker* case, when it went back for trial, we believe that the evidence we are prepared to present will establish that the defendants were wrong in their conclusion. We ask here only that we be allowed to try the case.

“While generalizations are, at times, helpful in giving us a thread or a criterion of similarity or dissimilarity, ultimately, the determination of a case involving trademark infringement or unfair competition, calls for pragmatic action. Each case must be determined in the light of its particular facts.” (*Palmer v. Gulf Pub. Co.*, 79 F. Supp. 731, 737 (S. D. Cal. 1948).)

In determining the ultimate issue of whether or not a plaintiff is entitled to trademark protection in a particular case, there are a number of factual questions that are entitled to consideration. This is well illustrated in the case of *Chappell v. Goltsman*, 186 F. 2d 215 (5th Cir. 1950). The plaintiff, who produced and sold blackberry preserves under the trademark “Bama”, sought to enjoin use of that name by the defendant in the sale of blackberry wine. As was done here, the trial judge dismissed the complaint upon the ground of failure to state a claim upon which relief could be granted. In reversing and remanding for trial, the Court of Appeals said:

“It is apparent that the court . . . completely disregarded as unimportant the averments of the complaint in respect to the long continued use of the trade-mark; the fact alleged that plaintiffs’ trade-mark has become identified with plaintiffs’ products

and business to the exclusion of all others and has thus acquired a secondary meaning; the averment that the similarity of defendants' trade-mark to the trade-name The Bama Company will and does embarrass and obstruct the business of plaintiffs, cause confusion and mistake, and deceives the public, and that the adoption by the defendants of a trade-mark so similar to plaintiffs' trade-name and trade-mark is injurious to the reputation, credit, and good standing of the plaintiffs; and last but by no means least, the averments which charge preconceived intention to injure plaintiffs, fraud and bad faith." (186 F. 2d 215, 217-218.)

The complaint in this case raises similar factual issues that are pertinent in determining our right to recover. To them we now turn once again in light of the defendants' brief.

C. The Factual Issues Actually Presented by the Complaint.

1. *The Likelihood of Confusion.* The whole position of the defendants on this point is summed up in the following statement from their brief:

"The facts that one party is in the restaurant business and that the other manufactures products of iron and steel, that they are not competitive, that their products are not sold in the same market, are elements affirmatively opposed to likelihood of confusion and appearing from the complaint." (Appellee Br. p. 18.)

We respond with the following:

(a) With slight paraphrasing, the defendants could just as well apply the above statement to almost all of the above-mentioned cases in which a contrary conclusion was drawn and in which protection was

granted or the matter was sent back for trial on the facts.

(b) We do not contend that a person that buys one of the defendants' barbecues made of steel thinks that he is getting a hamburger. But is it not a question of fact whether such a person might conclude that the plaintiff is extending its participation in the "hamburger field" by offering to the public the equipment upon which they can produce their own hamburgers at home?

(c) "Even if the goods be not in competition, the law protects a merchant in his interest 'in other goods, services or businesses which, in view of the designation used by the actor, are likely to be regarded by prospective purchasers as associated with the source identified by the trademark or tradename.'" (*Brooks Bros. v. Brooks Clothing of California*, 60 F. Supp. 442, 453 (S. D. Cal. 1945)). Is it not a question of fact whether or not this is the situation here, as suggested above? Furthermore, the matter of whether in actuality the defendants are in competition with us, in itself presents a real issue that should be litigated. (See par. C, 4, *infra*.)

(d) It is well established that proof of actual confusion or deception as to source is not necessary in order to entitle the plaintiff to relief.

Pastificio Spiga Societa Per Azioni v. De Martini Macaroni, 200 F. 2d 325 (2nd Cir. 1952);

Sun-Maid Raisin Growers v. Mosesian, 84 Cal. App. 485 (1st Dist. 1927).

Nonetheless, proof that such confusion had actually occurred is a strong factor in justifying the grant-

ing of relief. The opinion in the *Churchill Downs* case clearly shows that the Court was considerably influenced in its decision by the fact that . . . “The evidence plenteously establishes that its [the defendant’s] use of this name actually had an effect on the public to the prejudice of the reputation of Churchill Downs.” (*Churchill Downs Distilling Co. v. Churchill Downs*, 90 S. W. 2d 1041, 1044 (Ct. of App. Ky. 1936).)

See also, *Del Monte Special Food Co. v. California Packing Corporation*, 34 F. 2d 774 (9th Cir. 1929). We are prepared to offer similar proof on this important factual issue.

2. *The Strength of the Plaintiff’s Trade Mark.* We agree that a strong trade mark is entitled to broader protection than is a weak one, and we readily acknowledge that our “Big Boy” is not in a class with “Kodak”, or “Nujol”. However, we reject the defendants’ expert analysis that “It is much less fanciful than ‘Stork Club’” (Appellee Br. p. 16), and thus cannot be protected outside the restaurant field. The words of our trade mark constitute a commonly used expression, it is true; but they do not constitute an expression commonly used in referring to a hamburger; and it is in this context that they are fanciful. At least one of the two words “Stork Club” is descriptive, as is shown by the defendants’ use of it in identifying the very thing that they assert it does not describe. (See Appellee Br. p. 15.)

Our mark is just as fanciful as is “Minute Maid” (*Pure Foods v. Minute Maid Corp.*, 214 F. 2d 792 (5th Cir. 1954)); or “White House” (*Dwinell-Wright Co. v. National Fruit Product Co.*, 140 F. 2d 618 (1st Cir.

1944)); or "Bama" in Alabama (*Chappell v. Goltsman*, 186 F. 2d 215 (5th Cir. 1950)); and it is far less descriptive than the "Tips" that was involved in "Q-Tips" opposing "Johnson's Cotton Tips" (*Q-Tips, Inc. v. Johnson & Johnson*, 206 F. 2d 144 (3rd Cir. 1953)). As in all of the above cited cases, our right to protection depends upon the extent to which we have built up a secondary meaning for our "Big Boy". We do not claim an exclusive appropriation, but we think that our secondary meaning is broad enough to cover the present infringement by the defendants. Here again is a question for factual proof.

"In cases such as this then, both the similarities of the goods and of the marks used upon them must be considered together in order to arrive at an answer to the ultimate question of the likelihood of consumer confusion as to source. And to answer this question it is apparent that testimony may cover a wide range and that a great many factors must be considered, evaluated and related to one another. Thus the ultimate question of infringement is one of the type ordinarily classified as one of fact . . . [citing cases], and as such it is one primarily for the fact-finding tribunal—in this case the district court—" (*Dwinell-Wright Co. v. National Fruit Product Co.*, 140 F. 2d 618, 623 (1st Cir. 1944)).

3. *The Extent to Which "Barbecue" Connotes "Hamburger"*. At page 8 of their brief, the defendants offer the expert opinion that "When the public thinks of outdoor cooking and barbecues, steaks, chops, spareribs, chickens and roasts come to mind." We are somewhat surprised that the lowly hamburger is omitted from this list. Perhaps it is due to the difference in standard of living that our testimony would have included, and even

emphasized, that item. But, here again, it would seem to us that this is a matter for the trier of fact to determine.

4. *The Issue of Competition.* The defendants somehow read into the complaint an acknowledgment that the defendants are not in competition with the plaintiff and that their products are not sold in the same market. (Appellee Br. p. 18.) On the contrary, here we have another issue of fact. It is true that one does not buy our products and those of the defendants in the same places. However, the people who comprise the market for each are the people who like hamburgers, and both parties are competing for their trade.

5. *The Extent to Which the Addition of the Name of the Defendant Company to Their "Big Boy" Labels Al-
lays or Aggravates Confusion.* The defendants call attention to the fact that their "Big Boy" decals that are affixed to some of their articles disclose "Mfg. by Big Boy Mfg. Co., Burbank, Calif." (Appellee Br. p. 15.) They thereafter argue that confusion of source is completely negated. The same contention was unsuccessfully raised in the case of *Del Monte Special Food Co. v. California Packing Corporation*, 34 F. 2d 774 (9th Cir. 1929), as is shown from the following discussion in the opinion:

"It is manifest from the consideration of the facts that the conduct of the appellant [the defendant] in labeling its oleomargarine 'Del Monte Brand' is equivalent to marking it 'made by the California Packing Corporation' [the plaintiff]. Indeed, from the evidence, it would appear much less objectionable to make this direct statement than to label its goods 'Del Monte Brand' coupled with the name of the

‘Del Monte Special Food Company’ as the producer, for the reason that the public knows of the goods of the appellee by the brand rather than by its name.” (34 F. 2d 774, 775.)

The converse argument was made, with equal lack of success, in *Standard Oil Co. v. California Peach & Fig Growers, Inc.*, 28 F. 2d 283 (D. Del. 1928), in which the opinion stated, at page 286:

“The defendant seeks to prevent a finding of confusion upon the further ground that many advertisements of ‘Nujol’ do not contain the name or other indication of the identity of its manufacturer or producer. But ‘a person whose name is not known, but whose mark is imitated, is just as much injured in his trade as if his name was known, as well as his mark. His mark, as used by him, has given a reputation to his goods. His trade depends greatly on such reputation. His mark sells his goods.’ ”

At the trial, we will show that the plaintiff, too, has a place of business in Burbank and that the products of the plaintiff have come to be identified by the “Big Boy” trade mark rather than by the corporate name. It thus becomes a question of fact whether the use of the defendants’ business name lessens the confusion or adds to it.

6. *The Issue of Bad Faith on the Part of the Defendants in Appropriating the “Big Boy” Mark.* Our complaint alleges, in effect, that the “Big Boy” trade mark was first used by the plaintiff in 1938 [Tr. Rec. p. 4, par. V]; that the defendants were familiar with the plaintiff’s operation and its trade mark long before they appropriated it some time after 1950 [Tr. Rec. p. 12, par. II; p. 9, par. XIV]; and that they appropriated the mark with the deliberate intention of benefiting from the plain-

tiff's good will. [Tr. Rec. p. 12, par. II.] These allegations were not lightly made; we expect to prove them. Certainly, nothing in the law requires that we allow to go unchallenged this intentional pirating of the good name that we have carefully built up over the years. The plaintiff's trade mark is not as well known as "RCA," and, as the defendants point out, it may not yet be as famous as "Stork Club." (Appellee Br. p. 15.) In one sense it stands only for a relatively insignificant item, a hamburger. But we would like to show in a trial the extent to which the public has come to recognize the "Big Boy" trade mark, affixed even to a hamburger, as representing a high standard of quality and service, first in Southern California, and now increasingly across the nation. [Tr. Rec. pp. 7-9, pars. XI and XII.] Justice Learned Hand might well have been talking about the plaintiff, when he wrote the following much-cited passage:

"However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful." (*Yale Electric Corporation v. Robertson*, 26 F. 2d 972, 974 (2nd Cir. 1928).)

In light of all of the foregoing, we submit that it cannot be said as a matter of law that “. . . the borrower’s use is so foreign to the owner’s as to insure against any identification of the two,”

The fact that the defendants took the plaintiff’s mark is, of itself, a strong indication of their belief that they could thereby capitalize on the plaintiff’s good will, and is evidence of a likelihood of confusion, as we indicated in our opening brief. (Appellant’s Br. pp. 22-24.) The defendants say that the fact of such intent “. . . is immaterial except in cases of actual competition or close business relationship.” (Appellee Br. p. 23.) Here again, the broad statement begs the very question at issue. Do the defendants mean that the presence of such intent is not even significant to justify a trial on the issue? If the defendants, themselves, thought the relationship was significantly close, how can this Court properly hold to the contrary, as a matter of law? We submit that the “significance” of this element in the case is one to be considered by a trier of fact.

“To use precisely the same mark, as the defendants have done, is, in our opinion, evidence of intention to make something out of it—either to get the benefit of the complainant’s reputation or of its advertisement or to forestall the extension of its trade. There is no other conceivable reason why they should have appropriated this precise mark.” (*Aunt Jemima Mills Co. v. Rigney & Co.*, 247 Fed. 407, 409 (2nd Cir. 1917).)

“The evidence is convincing that defendant made its choice of ‘Cotton Tips’ in order to come as close as it thought legally possible to ‘Q-Tips’ and bask in

the reflected popularity of plaintiff's name." (*Q-Tips, Inc. v. Johnson & Johnson*, 206 F. 2d 144, 147 (3rd Cir. 1953).)

We conclude this argument with an extremely applicable quotation from an opinion of this Court:

"There is no need for the appellees to appropriate the appellant's 'fanciful' or 'arbitrary' trade name. As was said by the Supreme Court of California in *Eastern Columbia, Inc. v. Waldman*, *supra*, 30 Cal. 2d at page 270, 181 P. 2d at page 867: 'Under these circumstances it is difficult to find any justification for permitting defendant to use those words at all in his business whether alone or in conjunction with other words. There is no commercial necessity for him to use them. They are not necessary to describe his business or the products he sells such as there might be if they had other than a fanciful meaning with no geographic significance.'

"This thought that a newcomer has an 'infinity' of other names to choose from without infringing upon a senior appropriation runs through the decisions like a leitmotiv.

"In *Florence Mfg. Co. v. J. C. Dowd & Co.*, *supra*, 2 Cir., 178 F. at page 75, we find a classical statement of the principle: 'It is so easy for the honest business man, who wishes to sell his goods upon their merits, to select from the entire material universe, which is before him, symbols, marks and coverings which by no possibility can cause confusion between his goods and those of competitors, that the courts look with suspicion upon one who, in dressing his goods for the market, approaches so near to his successful rival that the public may fail to distinguish between them.'

“And in Coca-Cola Co. v. Old Dominion Beverage Corporation, *supra*, 4 Cir., 271 F. at page 604: ‘plaintiff’s rights are limited at the most to two words. All the rest of infinity is open to defendant. It will be safe if it puts behind it the temptation to use in any fashion that which belongs to the plaintiff. It has not done so voluntarily, and compulsion must be applied.’ ” (*Stork Restaurant v. Sahati*, 166 F. 2d 348, 361 (9th Cir. 1948).)

II.

The Complaint Does State a Claim Upon Which Relief May Be Granted.

It was our intention to assert allegations in our complaint that properly raised all of the hereinabove discussed issues. The defendants contend that we failed to do so, and they now present certain technical objections to our pleading. Irrespective of the extent to which the Federal Rules of Civil Procedure may have reduced the standards of acceptable pleading, it is always our desire to set forth in a complaint a cause of action that is drawn to the best of our ability, and we naturally would have been glad to make any amendment consistent with the facts that the court below considered necessary or desirable. However, Judge Westover did not rule on any of the defendants’ technical objections, and in view of the attitude that he took concerning the case, as hereinabove discussed, it would have been idle to amend in order to satisfy the defendants’ technical contentions even if they had been well taken, which we believe they were not.

In any event, we submit that the following must be acknowledged:

1. Viewing the complaint in the light most favorable to the plaintiff, surely it could hardly be said that “. . . the claim for relief could not be sustained under any state of facts which could be proved in support of it.” Thus, it should not have been dismissed.

Wooldridge Mfg. Co. v. R. G. La Tourneau, Inc.,
79 F. Supp. 908, 909 (N. D. Cal. 1948).

See also:

Stauffer v. Exley, 184 F. 2d 962 (9th Cir. 1950).

2. The complaint, at the very least, does “. . . indicate generally the type of litigation that is involved”; and it contains “. . . a generalized summary of the case that affords fair notice . . .,” which, according to the opinion in *Sunbeam Corp. v. Payless Drug Stores*, 113 F. Supp. 31, 37 (N. D. Cal. 1953), are all that Rule 8(a) requires.

III.

Conclusion.

This case presents real factual issues that should be tried. In some aspects our case is stronger than were the situations in the decisions upon which we rely; in other respects, we will have to depend more upon our ability to present evidence of such compelling persuasiveness as to demonstrate clearly that fairness and equity require a decision in our favor. This is a battle that we must fight because our trademark is of great importance

to us and its appropriation by the defendants constitutes a threat to its continued value. In this court battle, to use the analogy of another type of encounter, we are perfectly willing to take our chances on being able to out-punch our opponent according to the rules; but we think it most unfair for the referee to raise our adversary's arm in victory before we have been allowed to climb into the ring.

Dated: September 29, 1955.

Respectfully submitted,

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